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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 642

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

INTRODUCTION

The brief of the New Haven Trustees, emphasizing the essential transportation service that railroad provides, once again strenously urges upon this Court the proposition unanimously rejected by the court below: the Penn-Central merger must be consummated immediately in order to in-

sure the continuation of the New Haven's service. All the merger-created problems not yet resolved by the Commission are characterized as merely "ancillary" (New Haven Brief, p. 23), and the railroad appellants who seek delay of the merger pending resolution of those problems are accused of merely acting in the private interests of their security holders (*e.g., id.*, p. 21).

The effect of the New Haven brief, when combined with the common refusal of all the appellees to consider the plight of the Central Railroad Company of New Jersey (CNJ), is to create the false impression that there is only one major railroad in the East—the New Haven—whose essential service is now in jeopardy. CNJ is filing this separate reply brief* in order to correct this impression and to emphasize two points that, among the numerous issues raised and parties participating in this appeal, might otherwise escape the attention of the Court:

(1) Immediate consummation of Penn-Central as now conditioned—which has been shown unnecessary to save the New Haven**—could well reduce CNJ's shipping public to dependence upon the inferior, non-competitive service of a critically weakened road; and

(2) Despite CNJ's repeated attempts to raise this issue, the Commission has never considered it, and has even refused to do so in the reopened hearings held to consider protective conditions for the other smaller Eastern roads.

Continuation of CNJ's service is clearly essential. CNJ has repeatedly tried to demonstrate to the Commission that its service may not long survive the proposed merger as

*CNJ concurs fully in the points made in the Reply Brief of the other appellants in No. 642.

**See Brief for Appellants, No. 642, pp. 39-43.

now conditioned unless it is also assured of inclusion in a larger system, with adequate protective conditions pending such inclusion. But the Commission has persistently and unjustifiably refused even to hear CNJ's evidence or to decide what its future will be in the emerging Eastern rail structure.

CNJ urges that the Commission could not lawfully find immediate consummation of Penn-Central to be in the public interest before it considers and decides what is to be the place of CNJ and the other smaller Eastern lines left out of Penn-Central, and how they are to survive Penn-Central's impact in the interim. See Jurisdictional Statement, No. 642, First and Eighth Questions Presented, pp. 2, 3-4, and Discussion, pp. 13-19, 34-39.

I. CNJ Provides an Essential Transportation Service and Is in Perilous Financial Condition.

1. Area Served.

CNJ (excluding subsidiaries) operates 573 miles of road in New Jersey and Pennsylvania.* As shown on the map on page 6 of the Memorandum for the United States herein, CNJ's main line runs 191 miles westerly from Jersey City on the Hudson River in the New York harbor area to Scranton, Pennsylvania. Better than 80% of CNJ's traffic moves over at least a portion of this line. The Southern Branch of CNJ runs from the Newark-Elizabeth (N. J.) area south, bisecting the southern two-thirds of the State and ending

*Except as otherwise noted, the statements herein concerning CNJ's operations and financial condition are based on the affidavit of James L. Barngrove, Jr., filed in the District Court on September 13, 1966, R. 2399-410, and on evidence introduced by CNJ in the re-opened proceedings in Interstate Commerce Commission Finance Docket Nos. 21510 (sometimes referred to herein as the "N&W Inclusion Case") and 21989 (Penn-Central merger proceeding). (ICC Finance Docket numbers are hereinafter cited simply as "F. D.".)

just short of the Delaware Bay. Another branch runs north and bisects the northern third of the State. Numerous other branch lines in both Pennsylvania and New Jersey reach manufacturing centers, industries of all types and anthracite mining districts; in fact, CNJ serves more industries in New Jersey than any other railroad. CNJ also operates freight and passenger vessels between Jersey City and New York City.

2. Traffic Pattern.

In 1965, CNJ hauled 31.7 million tons of freight, producing revenues totaling $43.9 million. Only 10% of CNJ's freight tonnage is local traffic that both originates and terminates on CNJ's lines; 50% either originates or terminates on line (but not both); and 40% is "overhead" tonnage neither originating nor terminating on line. The principal points on its main line at which CNJ interchanges its 90% non-local traffic with connecting railroads are:

Jersey City, N. J. (traffic to and from New England via the New Haven and the New York Central, and traffic to and from Long Island via the Long Island R. R.);

Bound Brook Jct., N. J. (expedited service freight traffic between the New York Metropolitan Area and points south and west via Reading and subsequent connecting carriers);

Allentown, Pa. (north-south traffic to and from the Philadelphia-Washington-Baltimore area, east-west traffic to and from the Harrisburg-Pittsburgh gateways and points west, New England traffic via the Lehigh & Hudson River Railway and terminating coal traffic of B&O origin, the immediate connection again being with Reading, CNJ's chief interchange partner);

Wilkes-Barre, Pa. (north-south traffic to and from New England and northern New York via D&H, plus

east-west traffic via Pennsylvania R. R. and its family line, Lehigh Valley); and

Scranton, Pa. (where the north-south overhead traffic via Allentown, and traffic originating or terminating on the CNJ, are interchanged with E-L).

In addition to its freight traffic, CNJ operates a commuter service in New Jersey (with ferry service to New York City) carrying 12,000 passengers daily.

3. Competitive Service.

In discussing the competitive aspects of the proposed Penn-Central merger, the Commission noted that after the merger the applicants would no longer compete with each other in the New York port area. 327 I. C. C. at 517. Since this area contains the greatest concentration of population, industry, and commerce in the United States, it was clearly critical to the approval of Penn-Central for the Commission to be able to say, as it did, that following the merger the New York port area "will still be served by E-L, Reading, CNJ (pooled with B&O in New York harbor operations) and LV [Lehigh Valley] (which applicants agree to sell to C&O-B&O)." *Ibid.*

In this list of substantial remaining competitors CNJ and Erie are the most significant names. The evidence upon which the Examiners relied in making their findings as to the relative importance of the roads serving the New York area showed that in 1960 CNJ accounted for 18.1%, and Erie 17.0%, of the total rail traffic (in tons) originated and terminated in the New York Port Authority District.* (Reading accounted for only 5.6%, and Lehigh Valley for only 7.0%—and there is a very real possibility that Lehigh Valley may end up as part of the Penn-Central system.

*The Examiners' findings appear at pp. 248-49 of their Report and are evidently based on Applicants' Exhibit No. H-279, received in evidence at Tr. 15,784, F. D. 21989.

See 327 I.C.C. at 555, Appendix A, par. 14.) Moreover, aside from Penn itself, CNJ's lines are the sole connection into the New York City area from the Washington, D. C. gateway for the C&O-B&O system, the largest existing Eastern competitor of a merged Penn-Central.

One of CNJ's most important contributions to competitive rail service is its participation in the vital Alphabet Route, which was the subject of special protective conditions imposed by the Commission in the Norfolk & Western-Nickel Plate-Wabash unification proceeding (324 I. C. C. at 14, 146), and which was described in the Examiner's Report in F. D. 23178* in the following terms (sheets 24-25):

> "The so-called Alphabet Route through Connellsville embraces the N&W (through the former Nickel Plate, including the W&LE and the P&WV), Western Maryland, Reading and CNJ, and is a vital route for the handling of traffic between eastern and New England points, on the one hand, and midwest and western points on the other. *It has long been regarded as one of the major competitive east-west rail routes east of the Mississippi River. As such, it is in vigorous competition with long-haul routes of B&O, NYC, and PRR in that territory.* . . . It has been kept competitive with single-line routes solely through close cooperation among the component railroads to insure the best possible service and solicitation efforts. Over a considerable portion of the entire Alphabet Route, trains are handled in expedited service with through crews, power and cabooses. Such extensive through service arrangements have been complemented by solicitation and other traffic and sales efforts designed to

Chesapeake & O. Ry. Co. and B. & O. R. Co.—Control—Western Maryland R. Co. See *infra*, p. 8n.

promote and facilitate the maximum use of the route in providing important competitive rail service for the shipping public." (Emphasis supplied.)

4. Financial Condition.

CNJ's finanical condition can only be described as critical. Increased truck competition for CNJ's short-haul traffic, New Jersey's real property taxes (the highest in the nation), increased wage costs, and losses on commuter service running to $7 million annually have been mainly responsible for deficits in the past eight years totaling $44.7 million. The situation is getting worse rather than improving: in the twelve-month period ending June 30, 1966, CNJ suffered a deficit of $7.5 million. CNJ has so far been able to avoid bankruptcy only because it has received substantial sums from loans guaranteed by the United States under Part V of the Interstate Commerce Act,* from payments made by the State of New Jersey in connection with the rendering of commuter service, and from the sale of company property not required for railroad purposes. But although New Jersey has begun to absorb a larger part of CNJ's cash losses from passenger service, government guaranteed loans are no longer available, and CNJ is reaching the point where it cannot look to proceeds from the sale of property to be applied against its expenses. Soon the survival of CNJ will depend on its receiving outside support.**

Persistent reference by appellees to CNJ and Reading as "C&O-B&O family lines", as "part of the C&O-B&O system", and as C&O-B&O "affiliates" (*e.g.*, P-C Brief,

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*Under Part V the guarantee by the United States is not available "unless the Commission finds that without such guaranty . . . the carrier would be unable to obtain necessary funds, on reasonable terms, for the purposes for which the loan is sought . . . ." 49 U. S. C. § 1234(a)(1).

**See Petition of CNJ of November 4, 1966, for Reconsideration of the Commssion's Order dated October 4, 1966 in F. D. 23832 (denying request of N&W and C&O for immediate commencement of hearings on N&W-C&O-Dereco merger proposal).

pp. 2 n.1, 33; ICC Brief, pp. 20, 26, 65; New Haven Brief, p. 12) may give the impression that the additional financial burdens which Penn-Central inflicts on CNJ will be shouldered by C&O-B&O. B&O owns 38% of the stock of Reading; Reading owns some 49% and C&O 2% of the stock of CNJ. See J. S., App. A, p. 8 n.2. C&O-B&O's total ownership interest in CNJ is thus only about 20% (or $9 million) of CNJ's consolidated book net worth of $45 million at December 31, 1965. CNJ's long-term debt is $67 million. C&O-B&O's $9 million book value investment* in CNJ thus represents only 8% of the total debt and equity capital invested in CNJ. It is therefore obvious that C&O-B&O has little incentive to put money into CNJ, except as a necessary condition of a larger plan which would bring offsetting benefits (*e.g.*, the N&W-C&O-B&O-Dereco Plan). Evidence of record in the Penn-Central proceeding supports the view that C&O-B&O sees no justification for rescuing CNJ from the impact of Penn-Central and will not do so.** Furthermore, the Commission made no finding that C&O-B&O would finance CNJ's additional needs resulting from Penn-Central, and there is no evidence whatever in the record to support such a finding.***

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*The $9 million figure greatly overstates the true value of C&O-B&O's 20% interest. The market value of these shares is only about $875,000.

**Tr. 13,058, 20,387-88, F. D. 21989.

***In F. D. 23178, involving C&O-B&O's application to acquire control of Western Maryland, the Examiner's Report, served August 3, 1965, recommends that the Commission retain jurisdiction of the proceeding for a period of five years "for the purpose of permitting CNJ, *providing it has attained reasonable financial stability*, to petition for inclusion, under equitable terms, in the applicants' system" (sheet 27, emphasis supplied). As unsatisfactory as that recommendation is, CNJ realized that its financial condition did not realistically permit it to ask for more than that from C&O-B&O alone. As discussed *infra*, p. x *et seq.*, CNJ's first real hope for the necessary outside help appeared four weeks after the Examiner's Report was served, when on August 31, 1965, N&W and C&O-B&O announced their merger proposal and the Dereco Plan. (The commission has heard oral argument in F. D. 23178 and now has the application "under active consideration." 327 I. C. C. at 537 n. 12.)

II. The Commission Has Refused To Consider Evidence As To The Impact Of Penn-Central On The Public Interest In Continuation of CNJ Service.

1. CNJ's Efforts to Obtain a Hearing.

CNJ is challenging the Commission's order permitting immediate consummation of this merger because no provision has yet been made for CNJ's survival in the emerging Eastern rail picture. The history of CNJ's efforts to obtain an adequate hearing, and the Commission's inadequate reasons for denying such a hearing, are set forth in detail in the Appendix. A brief summary follows below.

When the Penn-Central hearings began in 1962, CNJ did not believe that the proposed Penn-Central merger would adversely affect it. Economic conditions in the railroad industry were very different in 1962 from what they are today, and Penn's and Central's financial positions were not nearly so strong then as they have become since that time. In addition, the three later changes in the merger terms that are so damaging to CNJ did not then appear likely. Until June, 1964, Penn and Central adamantly opposed inclusion of the New Haven. Until March, 1965, any possibility that trackage rights harmful to CNJ's traffic would be granted to D&H appeared minimal. Until April, 1966, there was no cause to expect that E-L, D&H, and B&M would be protected pending inclusion in a larger system by being put into a revenue pool with Penn-Central that not only omits CNJ but is also likely to cause additional direct damages to CNJ. Accordingly, CNJ did not participate in the initial round of hearings on the merger which ended in October, 1963.

In June 1964, however, when Penn and Central suddenly softened their opposition to inclusion of the New Haven, CNJ at once asked to intervene and sought a hearing to

offer evidence of how this inclusion would harm it. In July 1964, the petition to intervene was granted. But although the Commission at the same time ordered the reopening of the hearings for another purpose,* it denied CNJ a hearing on the grounds that CNJ had already had ample opportunity to present its evidence, and that in any event it could present its evidence at the later hearing which would be held to determine the terms and conditions on which New Haven might later be included. As it turned out, enlarging the reopened hearing to hear CNJ's evidence would hardly have delayed the proceeding, since the Examiners' Report did not appear anyway until March of 1965.

As the Appendix demonstrates, this is the technique the Commission has used throughout the Penn-Central proceeding to deny CNJ a hearing and to avoid deciding what to do about the injuries Penn-Central would inflict on it: either CNJ should have presented its evidence earlier and so is guilty of "laches",** or else it can present the evidence later in one of the several future proceedings in which the Commission intends to deal with basic problems caused by the proposed merger transaction, but only after it has been consummated. The net effect of this too late-too soon whipsaw of CNJ has been as follows:

> (1) CNJ has offered to prove that, based on 1965 figures, the unification of Penn and Central could result in a diversion of 10,721 cars of CNJ traffic which would cost CNJ $1,134,965 in freight revenues. CNJ has further offered to prove that the improved service of the Penn-Central system could, in the long run, divert 46,650 cars of CNJ traffic and cost CNJ an additional

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*P-C Brief, p. 3 & n. 4, mistakenly creates the impression that CNJ did not intervene until after the conclusion of the reopened hearings on September 16, 1964.

**The Commission's fullest statement of its theory of laches appears in the Report on Reconsideration, J. S., No. 642, App. B, pp. 21-25.

$2,000,000 in revenues. But CNJ has had no hearing on these claims and will never get one. The Commission has made no finding as to the effect of the merger on CNJ's services and it refuses to consider whether CNJ should be treated as a "protected" carrier for purposes of capital loss indemnification or Appendix G protective conditions.

(2) CNJ has attempted to prove that inclusion of the New Haven in the merged system will make 38,234 cars of CNJ's traffic susceptible to diversion with resulting revenue losses of $910,671. On this claim, which is a matter of the utmost importance to CNJ, CNJ will have no hearing before Penn-Central is consummated. It will have no opportunity to show either (a) that inclusion of the New Haven is inconsistent with the public interest because of its effect on CNJ's service or (b) that the grant of New Haven's right of inclusion in Penn-Central makes it necessary to grant CNJ the right of inclusion in some other major system, and to protect it in the interim. CNJ will only be permitted to show in a later proceeding that conditions should be imposed to protect CNJ's interchange traffic with the New Haven and revenues therefrom (though, of course, there is no present finding that effective conditions of this type will be possible without defeating the purposes of the inclusion).

(3) CNJ has urged that granting unrestricted trackage rights to D&H over Penn between Wilkes-Barre, Pennsylvania and Hagerstown, Maryland will render 30,854 cars of CNJ traffic susceptible to diversion and will cost CNJ $832,681 in revenues. Again, CNJ will have no hearing on this issue before Penn-Central is consummated but instead will be heard at a later time, when the Commission will presumably decide

whether to injure CNJ by granting the rights or to injure D&H and B&M by withholding them.

(4) CNJ believes that the proposed indemnification formula under Appendix G (or one substantially similar to it) will divert 28,577 cars of CNJ traffic and cause it $1,249,415 in lost revenues. CNJ has now been permitted to lay its evidence on this issue before the Commission in the reopened proceeding. But were it not for the stay granted by this Court, the Commission would have permitted Penn-Central to consummate before deciding whether CNJ's service can be maintained under any protective scheme adopted for the benefit of E-L, D&H, and B&M.

Making full allowance for all possible duplication between item (3) and (4), the total impact of the Penn-Central merger on CNJ could result in revenue losses totaling more than $5.3 million, representing 12% of CNJ's total freight revenue for 1965.*

The Appendix traces the process and the date by which each of the foregoing features of Penn-Central emerged and shows how CNJ was ruled either too late or too soon in its efforts to demonstrate the impact of the merger on its service. As the conditions progressively added to the proposed Penn-Central merger developed into an ever increasing threat to CNJ's survival, CNJ turned to other related

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*The foregoing evidence was placed before the District Court in the affidavit of James L. Barngrove, Jr., dated September 12, 1966, R. 2399-410, except that the affiant was not at that time able to estimate the full extent of the item (4) losses: the studies then available showed only item (3) as an index to the order of magnitude of item (4), i.e., $832,681 versus $1,249,415. R. 2406. Thus the potential losses to CNJ, as averred in the District Court, totaled $4.9 million, rather than $5.3 million. The full extent of CNJ's item (4) losses was detailed in the evidence offered by CNJ in the reopened Penn-Central proceeding. See *infra*, p. viii.

proceedings before the Commission, also described in the Appendix, in an effort to get a hearing on what its future would be in the radically changing Eastern rail structure. To this end it vigorously urged the Commission to grant a hearing on the N&W-C&O-Dereco Plan, the only merger application before the Commission which provides for the inclusion of Reading and CNJ. But again, until the Commission finally scheduled hearings for April of 1967, it was a question of "too soon-too late": the Commission regarded the N&W-C&O proposal as "too soon" in view of the effect it might have on the efforts of E-L, D&H, and B&M to obtain inclusion in N&W first, and as "too late" considered as a response by N&W and C&O to be considered along with the Penn-Central merger.* CNJ also participated in the N&W Inclusion Case, attempting unsuccessfully to offer evidence of the harm it would suffer from Penn-Central and urging, also unsuccessfully, that the N&W Inclusion Case should be consolidated with the N&W-C&O-Dereco application.

2. The Commission's Grounds for Refusing CNJ a Hearing.

The Commission has thus denied CNJ, while it is still alive, a meaningful hearing on what its fate is to be in the new Eastern rail structure, and has permitted the consummation of a merger that will cause serious harm to CNJ without even considering how the problem of a badly crippled CNJ is to be either temporarily or permanently resolved. In replying "too late—too soon" to CNJ's pleas, the Commission has relied primarily on a theory of "laches", coupled with hollow promises of a hearing at

*See Order dated October 4, 1966, F. D. 23832, reprinted as an appendix to the Memorandum of the United States herein.

some later time in some other proceeding or fragment of a proceeding.*

There are several compelling reasons why "laches" has no proper place in these proceedings, and why CNJ's fate ought to be resolved now rather than at some indefinite future time after Penn-Central is consummated.

As to laches, there is no factual basis for application of that concept here. Laches is not a mechanical rule, like limitation, but rather an equitable doctrine which can be invoked by a defendant only when the plaintiff's undue delay in asserting his rights makes it unfair to permit his claim to be enforced against the defendant. *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946); *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206, 215 (1963). Assuming, rather absurdly, that Penn and Central were "defendants" in the proceeding before the Commission, no one (including the Commission) has suggested in what way "plaintiff" CNJ's delay in asserting its "rights" in the merger proceeding prejudiced Penn and Central: indeed, as the proceeding has been twice reopened since CNJ's initial effort to obtain a hearing, it is hard to see what practical reason there could have been for barring an investigation of the effect of the merger on CNJ.** Furthermore, if

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*Compare L. Carroll, *Through the Looking-Glass*, ch. V, pp. 94-95 (London, 1931):

> "'The rule is, jam to-morrow and jam yesterday—but never jam *to-day*.'
>
> "'It *must* come sometimes to "jam to-day,"' Alice objected.
>
> "'No, it ca'n't,' said the Queen. 'It's jam every *other* day: to-day isn't any *other* day, you know.'"

**Cf. *Menendez* v. *Holt*, 128 U. S. 514, 523-24 (1888): "[U]pon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder . . . . [S]o far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay . . . ."

equitable doctrines are to be decisive here, a court of equity always retains jurisdiction to modify its decree upon a showing that changed circumstances have turned the decree into an instrument of injustice. See *United States* v. *Swift & Co.*, 286 U. S. 106, 114-15 (1932). The Appendix to this brief amply demonstrates how the proposed merger has evolved into something which, from CNJ's standpoint, is quite different from, and more threatening than, the original proposal.*

More importantly, invocation of the doctrine of "laches" cannot excuse the fact that, by refusing to consider the effect of the Penn-Central merger on CNJ, the Commission has defaulted in meeting its statutory responsibilites. Congress has declared it to be the National Transportation Policy "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers," all for the purpose of developing "a national transportation system" that is "adequate to meet the needs of the commerce of the United States . . . ." 49 U. S. C. note preceding § 1. And Congress has provided that all the provisions of the Interstate Commerce Act, including the merger provisions of Section 5(2), "shall be administered and enforced with a view to carrying out the above declaration of policy." *Ibid.* These statutory provisions impose on the Commission an affirmative responsibility to develop and consider all the relevant facts in connection with any merger proposal having as many ramifications for the public interest as that of Penn-

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*Of course, as shown in the joint Brief for Appellants in No. 642, p. 28 n. 18, the doctrine of laches is suited only to adversary proceedings brought by private plaintiffs asserting infringement of proprietary interests. In an administrative proceeding in which the sole issue is the public interest, the doctrine of laches is but marginally relevant. See *Federal Trade Comm'n* v. *Algoma Lumber Co.*, 291 U. S. 67, 80 (1934).

Central.* In the instant case, however, the Commission not only repeatedly ignored the pleas of the Department of Justice that the public interest required affirmative protection by the Commission itself,** it even went so far as to prevent CNJ from making a record that would enable the Commission to consider the effect of the merger on CNJ's service and thus dispose of the merger application consistently with the National Transportation Policy.

Since no adequate record was made as to CNJ, the Commission obviously could not make any findings as to what

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*Compare the views of Commissioner Aitchison of the Interstate Commerce Commission concerning the obligations of administrative agencies (quoted in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, 892 (S. D. N. Y. 1951), *aff'd* 342 U. S. 950 (1952)):

> "'They are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * *. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible * * *.'" (Footnote omitted.)

The same point is made in *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608, 620 (2d cir. 1965), *cert. denied*, 384 U. S. 941 (1966).

**See, *e.g.*, discussion, *infra*, p. iii n.; p. v; also 327 I. C. C. at 502 (in passing on merger applications, the Commission has no duty to consider that other possible rail alignments may be preferable to the one proposed). In its brief to the Commission on June 1, 1964, the Department of Justice observed that Penn and Central "tried this case factually as though they were seeking the unification of two parallel short line railroads . . . which could not possibly have any adverse impact on the public interest," and that they should have been required to show that approval of the merger would not hinder the objectives of the National Transportation Policy (p. 153).

consummation of Penn-Central will mean to CNJ.* In *Schaffer Transp. Co.* v. *U. S.*, 355 U. S. 83 (1957), this Court set aside a decision of the Interstate Commerce Commission because its findings did not provide the Court with a basis for determining whether the Commission's decision comported with the National Transportation Policy. The Court observed: "[j]ust as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress." *Id.* at 88. Similarly in this case, the Commission's inability to make any meaningful findings concerning the survival of CNJ does not provide this Court with any basis for determining whether the Commission has acted consistently with the National Transportation Policy in permitting immediate consummation of Penn-Central.

Even without reference to the National Transportation Policy, it is evident that the Commission's failure to consider the impact of the proposed merger on CNJ was contrary to law. Under 49 U. S. C. § 5(2)(c), the Commission is required to consider "the effect of the proposed transaction upon adequate transportation service to the public" and "the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction." In addition, under the rule of *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 87 (1944), the Commission has the duty "to consider the

*It is quite clear on the face of the Report on Reconsideration herein that the Commision has not adequately considered what the effect of the proposed Penn-Central merger transaction will be on CNJ and the service which it provides; as noted, *infra*, p. v, the Commission itself found it necessary to eliminate the Examiners' finding that CNJ's service would not be adversely affected.

effect of the merger on competitors and on the general competitive situation in the industry . . . ."

In turning away from the effect of the Penn-Central merger on CNJ's service and competitive viability, the Commission ignored these plain requirements of the statutory scheme it administers. If CNJ's transportation service is essential (and the Commission has never intimated the contrary), then it is hard to see how immediate consummation of the proposed merger can be in the public interest before measures are taken to prevent the merger's impact from reducing CNJ's service and competition to the inferior level provided by an impoverished railroad.* Yet, on this record and on these findings, no one can say that such a result will not occur.

As the foregoing discussion shows, "laches" is an inadequate excuse for the Commission's treatment of CNJ. The future of CNJ's service ought to be decided now, before Penn-Central is consummated and while CNJ is still alive, rather than at some indefinite time in the future. It is no answer to CNJ's pleas to reiterate the unchallenged propositions that the Commission no longer is required to formulate a "master plan" for rail unification in each region (ICC Brief, pp. 43-46) and that the Commission has in the past been upheld in its refusal to consolidate all the pending Eastern merger applications into "a single gigantic proceeding" (*id.*, pp. 46-56).

CNJ is not asking for master planning, nor is it urging on the Commission any particular procedure, such as consolidation for hearing. The point we make is rather that the proposed Penn-Central system is *itself* a master plan,

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*Compare the Commission's findings in this case as to the three protected roads: "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger." 327 I. C. C. at 532.

involving almost 50% of the railway operating revenues in the Eastern region, more than twice the revenues of any other system. It is a private plan, to be sure, conceived by private interests rather than the Commission, but this does not alter its vast potentialities both for benefit and for harm to the public interest. It is the third and most critical stage to date of the "Eastern Merger Movement", as a result of which the Commission has now approved three privately planned mergers embracing over 85% of the railway operating revenues in the entire Eastern railroad market.* It poses the unavoidable question of whether the remaining roads can survive as presently constituted or whether they should be restructured into a balanced competitor for Penn-Central.

The Commission's inescapable duty to resolve this question may not have arisen at the earlier stages of the Eastern rail merger movement, when the impacts of the proposed mergers were concededly slight (ICC Brief, p. 48) and many alternatives for future alignments were still open for the unincluded roads. But such a duty is necessarily thrust upon the Commission by the time it has approved major merged systems having 85% to 95% of all the railway revenues in the East.

At least by this stage of the merger movement, the Commission no longer has discretion to ignore the impact of its actions upon any other Eastern line that asks to come in from the cold.

CONCLUSION

The Commission has unlawfully permitted the developing Eastern rail merger movement to become a grim game of musical chairs for the smaller railroads seeking inclusion in a major system: when Penn-Central is consummated and

*If E-L, D&H, and B&M—all destined by the Commission for eventual inclusion in a major system—are added, the total is almost 95%.

the music stops, CNJ will be left standing alone to face bankruptcy, while the shipping public it serves will suffer from inferior service and weakened competition, if indeed CNJ remains able to provide any competitive service at all.

CNJ asks only that the Commission be required to consider and determine CNJ's fate in Penn-Central or some other proceeding, before consummation of Penn-Central is permitted to occur. It is simply not consistent with the National Transportation Policy for the Commission to permit the creation of a giant rail system having half the railway business in the East before it considers evidence and makes supportable findings that the service provided by each of the few remaining roads will remain "safe, adequate, economical, and efficient".

Accordingly, CNJ suggests that the Commission's order permitting immediate consummation of the Penn-Central merger should be set aside and the cause remanded to the Commission with directions to defer consummation until the Commission resolves the fate of CNJ and the other smaller Eastern roads outside of Penn-Central and makes arrangements for their survival in the interim, in a manner consistent with the National Transportation Policy.

Respectfully submitted,

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APPENDIX

Chronological Outline of Commission's Treatment of CNJ in Penn-Central and Related Proceedings

a. Penn-Central Proceeding.

i. *CNJ's Petition to Intervene.*

On March 9, 1962, Penn and Central filed their application with the Commission for approval and authorization of their merger. The New Haven filed a petition for inclusion on June 26, 1962. The merger as proposed did not contemplate the inclusion of the New Haven, and during the 128 days of public hearings held between August 20, 1962, and October 2, 1963, Penn and Central maintained that "there was no need for inclusion of N. H. and [that they] were doubtful whether the merger would be consummated if approval were so conditioned." (Examiners' Report and Recommended Order, March 29, 1965, p. 346.)

In their joint brief of June 1, 1964, however, Penn and Central, while still opposing New Haven inclusion, suggested that they would be receptive to any of three brand new alternative proposals, all of which contemplated arrangements short of inclusion under which New Haven's interchange traffic would be moved by New York Central's Boston and Albany line, having a direct connection with the merged system, for the benefit of New Haven.

On June 23, 1964, three weeks after receipt of Penn's and Central's brief, CNJ petitioned the Commission for leave to intervene and to present evidence as to the effect of these new proposals on CNJ. Originally, CNJ had not believed that the proposed merger would adversely affect it, and, in December of 1962, in view of the railroad industry's economic condition at that time, CNJ's President, P. M. Shoemaker, had stated CNJ's conclusion that "the

Jersey Central will be strengthened by its interchange business with the improved stability of the two companies involved in the merger." (Exhibit 1 to Affidavit of J. G. Patten, September 20, 1966. R. 813.) But the emerging prospect that large portions of CNJ's interchange traffic with New Haven would be diverted from CNJ to the Penn-Central system radically altered the basis of that conclusion and made it necessary for CNJ to come forward to protect its interest.

By an order served July 30, 1964, CNJ's Petition for Leave to Intervene was granted by the Commission, but its request for further hearing as to the effect on CNJ of Penn and Central's New Haven proposals was denied (although the Commission, by the same order, reopened the proceeding for a further hearing on September 16, 1964, to receive evidence concerning the effect of a new labor agreement on the proposed merger savings). The grounds for denying further hearing were that CNJ had had "ample opportunity" to present evidence at the hearing as to the effect on it of New Haven's inclusion and that, in the event inclusion of the New Haven were ordered, on terms to be subsequently approved, CNJ would have ample opportunity to present such evidence at the further hearing which the inclusion terms would require.

ii. *Examiners' Report.*

The Report and Recommended Order of the Hearing Examiners was thereafter served on March 29, 1965, more than eight months after CNJ's request for further hearing had been denied. Despite the fact that CNJ had been refused permission to present any evidence, the Hearing Examiners found, as to the CNJ and the other carriers not

presenting evidence, that the possibility of new traffic relationships among such carriers would mean that "the net effect [of the merger] will not be detrimental to such carriers individually or to their ability to provide a general transportation service to the public" (Examiners' Report, p. 305).* The Examiners did not mention at this point that their Report elsewhere recommended inclusion of New Haven's freight service in the merged system (pp. 411-415), or the finding in their Report that in 1961 New Haven interchanged 49,540 loaded freight cars with CNJ, as well as 85,917 cars with the Lehigh and Hudson, "on the majority of which E-L and CNJ were connecting carriers" (p. 330). Nor did the Examiners note that elsewhere in the Report, in order to facilitate possible subsequent inclusion of B&M and D&H in the N&W system, Penn was required to provide trackage rights to D&H between Wilkes-Barre, Pa. and Hagerstown, Md. so that D&H (and thereby B&M) would have a direct connection to the N&W system (p. 416)—thus providing a means by which CNJ might be deprived of important overhead coal traffic originating in coal fields on the B&O and Western Maryland lines and delivered to D&H by CNJ at Wilkes-Barre, Pa.

*This critical finding was based on (1) the failure of the Department of Justice and the other parties urging injury to non-participating carriers to present evidence indicating adverse effect on these carriers, since it could not be said "that the Commission should on its own seek out such testimony" (Examiners' Report, p. 303); (2) the conclusion that the inaction of the non-participating carriers "infers a managerial decision by each that the anticipated benefits from its individual merger program will outweigh any injury or harm which may result from other merger plans" (p. 304); and (3) the fact that the only study of record assessing injury to Reading and CNJ (made by the State of Pennsylvania to study the effects of the merger on that State) generally concluded that although the merger would have some effect on the roads serving that State, it "should not seriously impair their ability to provide service" (pp. 304-305). This finding was subsequently eliminated by the Commission. See *infra*, p. v.

iii. *Commission's Original Report.*

CNJ filed its Exceptions to the Examiners' Report dated July 9, 1965, requesting that the Commission deny the merger application pending further hearings on the basic merger proposal, the inclusion of the New Haven, and the granting of trackage rights to D&H. CNJ pointed out particularly that the trackage rights had not been part of the merger application, nor the subject of any testimony as to its effects. CNJ specifically called attention to the harm to competition and to adequate transportation service that would result from the destruction of CNJ operations. The Commission responded to CNJ's pleas by observing that "CNJ chose not to participate in the hearings, thus leaving a void in the record as to its probable post-merger status." 327 I. C. C. at 521. As to the effect on CNJ of inclusion of the New Haven in the merged system, the Commission merely gave CNJ "an opportunity to appear in the inclusion proceeding to seek protection for . . . [its] traffic and gateways." *Id.* at 527. Consideration of CNJ's objection to the D&H trackage rights was similarly put off: D&H and Penn having reached an agreement with regard to the terms of such trackage rights, and such agreement necessarily being the subject of a future hearing, the Commission would "take no dispositive action as to the trackage rights at this time" and so the objections of CNJ and others were deemed to be "premature". *Id.* at 528. Besides entirely ignoring CNJ's ever-worsening situation, the Commission added to the merger transaction, without notice or hearing, yet another condition discriminating against CNJ and inimical to its survival: the Appendix G protective conditions for the benefit of E-L, D&H and B&M, but not CNJ. No protective conditions of this or any other type were prescribed for CNJ.

Appendix

iv. *Commission's Report on Reconsideration.*

In its Petition for Reconsideration of July 7, 1966, CNJ again asked the Commission to postpone the merger and to give CNJ a hearing. In addition to the issues it had previously raised, CNJ now adverted to the newly-imposed protective conditions. CNJ referred to the recent refusal of Commissioner Webb in the N&W Inclusion Case, F. D. 21510 (discussed, *infra,* p. x), to admit testimony concerning the detrimental effect of Penn-Central on CNJ, on the ground that the Commission had accepted the Examiners' finding in the Penn-Central proceeding that there would be no such adverse effect. In its Reply of August 8, 1966, to the various petitions for reconsideration, the United States supported the request of CNJ (and the other railroads which had not been heard) for further hearings. But, in its Report on Reconsideration of September 16, 1966, the Commission declined to postpone the merger or reopen the proceeding for the purpose of permitting CNJ to demonstrate the full extent of the harm it would suffer. Instead, the Commission adopted the alternative suggestion of the C&O-B&O (which was not advanced by CNJ and did not meet CNJ's problem) that the Commission eliminate its prior finding* of no adverse effect. The finding was modified to read: "it has not been shown of record that this merger will be detrimental to C&O-B&O, CNJ, or Reading individually or to their ability to provide a general transportation service to the public." J. S., No. 642, App. B., p. 25. The Commis-

*In its Report of April 6, 1966, the Commission had adopted all the findings and conclusions of the Examiners which it did not "here modify or reject": 327 I. C. C. at 481-82. That Report had contained no modification or rejection of the Examiners' finding that the merger would not be detrimental to CNJ.

sion stated that it would not give the petitioners a hearing on the question of the merger's impact on them because they were "guilty of laches" (*id.*, p. 24) and because further delay was undesirable; it ignored the suggestion of the Department of Justice that the Commission had an affirmative duty to discover where the public interest lay, aside from, and in addition to, the positions taken by the private parties. The Commission did, however, order further hearings with respect to the protective conditions of Appendix G—limited to the issue of protection for E-L, D&H and B&M and not for others such as CNJ—and the suggestion by the three protected roads that they should also be indemnified for any diminution of their capital value resulting from the proposed merger. *Id.*, pp. 36-45.

v. *District Court Proceeding.*

CNJ (together with Reading) filed one of the three actions herein that were consolidated and decided together in the District Court. Its complaint and supporting affidavit renewed CNJ's objection to the failure of the Commission to accord it a hearing with respect to the effect of the various aspects of the proposed merger transaction on its operations.* The District Court, however, perhaps because of the number of parties and issues before it, paid no more attention to CNJ's contentions than the Commission had. With regard to the merger conditions other than the indemnity provisions of Appendix G, the District Court merely observed, without elaboration, that it saw no prospect that any

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*See especially Complaint, par. XV, XXII (9), XXIII (5), R. 2354-55, 2361-62, 2363; also Memorandum of Authorities In Support of Application For Interlocutory Injunction, pp. 11-13, 16-20, R. 2378-80, 2383-87; Oral Argument of Counsel for CNJ, Sept. 21, 1966, R. 2811-19.

"non-protected carrier would be able to persuade a reviewing court to set aside for lack of substantial evidence the findings of failure to show serious diversion arising from the merger itself", referring in a footnote to the Examiners' finding of "an absence of adverse effect" on CNJ. J. S., No. 642, App. A, p. 18 n. 7. (The District Court did not at this point make reference to the fact, noted elsewhere in its opinion, *id.*, p. 14 n. 5, that the Commission on reconsideration had eliminated this finding by the Examiners.) As to the effect of the indemnity provisions for the three protected carriers on the unprotected ones, the District Court concluded that the contentions of the unprotected carriers "have been sufficiently met by the Commission's grant of further hearing and reconsideration." *Id.*, p. 26.

When the District Court refused to issue an interlocutory injunction against the consummation of the merger, CNJ joined in the instant appeals to this Court, again contending that the merger transaction had been approved by the Commision without hearing evidence of its adverse effect on CNJ or deciding what to do about it. See J. S., No. 642, First and Eighth Questions Presented, pp. 2, 3-4, and Discussion, pp. 13-19, 34-39.

vi. *Reopened Proceeding.*

While consummation of the merger was stayed by this Court pending appeal, hearings in the reopened Penn-Central proceeding commenced on October 31, 1966, and were concluded on December 16, 1966. These reopened hearings and any Commission action thereon are not now before the Court for review, but the relevant parts of the proceedings to date are described below for the sake of completeness.

The first issue considered was the possible "capital indemnification" for the three protected roads, first raised on

petition for reconsideration after the Commission's decision of April 6, 1966. CNJ again sought to offer evidence showing that it too would suffer serious traffic diversion as a result of the merger and that it was as much entitled to a capital loss indemnification as any other railroad. The Examiners excluded this evidence as being beyond the scope of the reopened proceeding, and on appeal the Commission, by order served November 14, 1966, upheld the Examiners: "broadening of the issues at this time is unwarranted since the petitioners here did not avail themselves of previous opportunity to show adverse effect (although the issue of capital-loss indemnity is new to the proceedings, it is merely an out-growth of the showing by the three 'Appendix-G' railroads)."*

The second phase of the reopened proceeding related to the Appendix G conditions imposed by the Commission for the benefit of the three protected roads. CNJ again offered evidence designed to show that it needed protection from Penn-Central as much as the three "protected roads"; again the evidence as to loss resulting from the basic merger, from New Haven inclusion, and from D&H trackage rights, was excluded; but James L. Barngrove, Jr., CNJ's Vice President of Freight Traffic, was permitted to testify that

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*By stipulation the entire record in the N&W Inclusion Case, F. D. 21510, was made a part of the record in the capital indemnity phase of the reopened Penn-Central proceeding. See Tr. 20,156. In the Inclusion Case, CNJ had been permitted to introduce testimony which detailed the losses which would result from the proposed D&H trackage rights, and which made passing reference to the revenue CNJ would lose from inclusion of New Haven in Penn-Central (Ex. CNJ-2, pp. 7-8; Ex. CNJ-3, p. 3). In view of the Commission's ruling, however, this evidence will avail CNJ nothing. (In the second phase of the reopened Penn-Central proceeding, dealing with the Appendix G conditions, the record in F. D. 21510 was incorporated only for a limited purpose not relevant to CNJ's problems. See Tr. 21,450.)

the effect of the proposed indemnity formula of Appendix G for the benefit of the three protected roads would be to cause a loss of revenue to CNJ of $1,250,000. The direct examination of Mr. Barngrove was concluded in this manner:

> "Q. (By Mr. Wachenfeld [counsel for CNJ]): Mr. Barngrove, will the harm to be suffered by CNJ as a result of the Penn-Central merger threaten the survival of CNJ?
>
> "Mr. Bongartz [counsel for Penn]: Objection.
>
> "Exam. Murphy: Sustained.
>
> * * *
>
> "Q. (By Mr. Wachenfeld): Mr. Barngrove, will the combination of the traffic conditions which are the subject of this hearing and the harm to be suffered from the Penn-Central merger threaten the survival of CNJ?
>
> "Mr. Bongartz: Objection.
>
> "Exam. Murphy: Sustained.
>
> "Q. (By Mr. Wachenfeld): Mr. Barngrove, will the imposition of the temporary traffic conditions which are the subject of this hearing threaten the survival of CNJ?
>
> "A. Yes. I definitely think so. Anything that causes our present precarious financial situation—anything that causes a diversion of traffic and revenue will be serious to CNJ." (Tr. 22184-85, as corrected at 22,398.)

b. Related Proceedings.

The related proceedings described below are also not before the Court for review in this case. But they are frequently referred to in the Commission's decisions now under review, in the briefs of all the parties, and in the record of the Penn-Central proceedings. Since the crux of this case is the admitted relationship of the Penn-Central proceedings to all the other pending Eastern merger proceedings, the pertinent portions of these other proceedings are also summarized below.

On August 31, 1965, Norfolk & Western and Chesapeake & Ohio announced their proposal to merge C&O into N&W and their willingness, as a condition of approval of the merger, to include E-L, D&H, B&M, Reading and CNJ on specified terms and conditions (the "Dereco Plan"). On October 11, 1965, N&W and C&O filed a joint application with the Commission seeking authority for the merger, and the application was assigned Finance Docket Nos. 23832 and 23833. This application was the first (and still is the only) application to the Commission in which the applicants propose the inclusion of Reading and CNJ in one of the developing Eastern railroad systems.

In the meantime, however, B&M, D&H and E-L filed petitions in F. D. 21510 on September 23, 24 and 28, 1965, respectively, for inclusion in the N&W system pursuant to the provisions of Appendix O of the Commission's Report and Order in the N&W-Nickel Plate-Wabash unification proceeding (324 I. C. C. at 148). By order dated November 2, 1965, the proceedings in F. D. 21510 were reopened for action on the petitions for inclusion. CNJ filed a petition, dated December 3, 1965, for leave to intervene in opposition to the petitions for inclusion on the ground that approval of

these petitions before full consideration of the N&W-C&O-Dereco application would not be in the best interest of CNJ or the shipping public. CNJ's petition to intervene was granted on January 17, 1966.

On December 15, 1965, N&W and C&O filed a petition to consolidate the reopened proceedings in F. D. 21510 for hearing and decision with their merger application in F. D. 23832. CNJ filed a reply in support of this petition for consolidation dated December 20, 1965, but the Commission, in its order of February 3, 1966, denied the petition to consolidate on the grounds that consolidation would introduce new issues into F. D. 21510 and that the petitions for inclusion and the N&W-C&O merger application were not mutually exclusive. Thereafter, public hearings were held in F. D. 21510 on 25 days between April 20, 1966 and August 10, 1966.

At the hearing, on June 14, 1966, CNJ offered evidence of the potential losses of traffic and revenue which the Penn-Central merger, aside from the Appendix G indemnity formula, could inflict on CNJ. Only the evidence concerning the losses from the proposed D&H trackage rights was admitted;* the evidence as to the losses threatened by the merger of Penn and Central and the inclusion of the New Haven was stricken (Tr. 3230-32), on motion by the Erie, for the reasons set forth in the following ruling by the Presiding Officer (Commissioner Webb) on a similar motion to strike similar testimony by a C&O-B&O witness:

> "I would like to set my ruling in a certain context: The C&O-B&O was a party in the Penn-Cen-

*CNJ was also permitted to introduce evidence as to its operations and financial condition and as to the fact that CNJ can survive only as a part of one of the larger systems evolving in the East.

tral Case. It did not present any evidence in that proceeding to demonstrate any detrimental effect of the proposed Penn-Central merger.

"The Examiners in the Penn-Central Case found at page 305, referring to B&O-C&O, as well as to Reading and Central of New Jersey, that the net effect of the Penn-Central merger will not be detrimental to such carriers individually or to their ability to provide a general transportation service to the public. There was no discussion in the Commission's Report in the Penn Central Case relating to the impact of the merger on C&O-B&O.

"Accordingly, it must be presumed that the Commission adopted the finding of the Examiners when it said at pages 481 and 2 of that Report, 'Also adopted are those conditions, findings and conclusions of the Hearing Examiners which we do not here modify or reject.'

"I recognize that it might have been sufficient if the Examiners had simply found that adverse effect, alleged adverse impact had not been shown. In any event and inasmuch as petitions for reconsideration in the Penn-Central Case may be filed, as I understand, until June 27th, to modify the findings of the Commission, it seems to me that it would be most inappropriate in this case to go into the issue of the adverse competitive effect, if any, on C&O-B&O. Therefore, the motion to strike is granted." (Tr. 3191-92)*

*Subsequently, on September 16, 1966, in its Report on Reconsideration in the Penn-Central proceeding, the Commission eliminated the finding that Penn-Central would not be detrimental to C&O-B&O, Reading and CNJ. *Supra*, p. v.

Appendix

Opening briefs were filed in F. D. 21510 on September 19, 1966, and reply briefs on October 19, 1966. In its opening brief CNJ argued that the three petitions for inclusion should be denied because the evidence showed that granting them would wreck the Dereco plan, the only salvation in sight for CNJ. CNJ also urged that it was error to exclude the evidence it had offered as to the effect of the Penn-Central merger on its operations. In his Report of December 22, 1966, the Presiding Officer stated that "[t]he method of inclusion recommended herein is not inconsistent with the Dereco plan of organization and will not preclude Commission approval of an N&W-C&O merger" (sheet 20), and that "[t]he fact that Reading and CNJ seek to be included in an enlarged N&W system, if such a system should be approved by the Commission, obviously has no bearing on the public interest aspects of this proceeding" (sheet 37). As to the exclusion of the evidence of the impact of Penn-Central on "C&O and its family lines", the Presiding officer adhered to the view "that it is inappropriate to determine that issue in this proceeding" (sheet 35), adding that the excluded evidence was not material because inclusion of the three petitioners in the N&W system would not have a significant impact on the protesting railroads.* (In dismissing CNJ's attack on the D&H trackage rights, the Presiding Officer minimized CNJ's losses by apparently assuming that the rights would be granted only in the "restricted" form currently proposed by Penn and D&H—although the Com-

*CNJ would not quarrel with the proposition that its fate after consummation of Penn-Central is an issue that it is more "appropriate" to consider in the Penn-Central proceeding than in F. D. 21510—but it is an issue that desperately needs prompt consideration in *some* proceeding, and CNJ's efforts to get it considered in F. D. 21510 were born out of its frustration in the Penn-Central proceeding.

mission has yet to consider the terms of the trackage transaction. See sheet 32 n.27.)

While the proceedings in F. D. 21510 were going forward expeditiously, the proceedings on the N&W-C&O-Dereco application in F. D. 23832 were stalled. By petition dated February 14, 1966, CNJ requested inclusion in the merged N&W-C&O system on equitable terms. By letter of June 29, 1966, CNJ joined the applicants in urging that hearings on the merger not be delayed. But, after a prehearing conference in September, the efforts by the applicants and CNJ to have the Commission commence oral hearings were rebuffed by the Commission in its order dated October 4, 1966, set forth in the appendix to the Memorandum for the United States herein, on the odd ground that it would introduce pertinent new issues going to the heart of Penn-Central and complicate the problem of completing the Penn-Central proceeding. CNJ joined the applicants in petitioning the Commission for reconsideration of this order, pointing out that indefinite delay in consideration of the only plan providing for CNJ's future is, in light of CNJ's precarious financial condition, detrimental to CNJ and the public which it serves. By order dated December 23 and served December 30, 1966, the Commission finally ordered that the hearings begin on April 17, 1967.